Brief of Petitioner

Supreme Court of the United States

OCTOBER TERM, 1921

NO. 90

JOHN GOOCH, JR., Petitioner

VS.

OREGON SHORT LINE RAILROAD COMPANY

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth District

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Petition for Certiorari Filed June 18, 1920.

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(27,769)

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BRIEF OF PETITIONER

This cause originated in the District Court of the United States for the District of Idaho, Eastern Division, wherein, after the proofs of the plaintiff, your petitioner, had been adduced, the Court granted the defendant's motion for a non-suit and dismissed the jury (Transcript of the Record, page 36), and judgment of dismissal of the action was thereupon entered (Transcript of the Record, pages 8 and 9). On writ of error to the Circuit Court of Appeals of the Ninth Circuit judgment of the District Court was affirmed (Transcript of the Record, page 49), and petition for rehearing denied (Transcript of the Record, page 50), and thereupon, upon application of your petitioner, this Court granted a writ of certiorari directed to the Circuit Court of Appeals

of the Ninth Circuit, upon which writ the cause is now before this Court.

John Gooch, the petitioner, on November 23rd, 1917, made a shipment of livestock from Bancroft, Idaho, to Omaha, Nebraska, over the lines of the respondent, the Oregon Short Line Railroad Company, and its connecting carrier, the Union Pacific Railroad Company, with which shipment of livestock John Gooch went as caretaker (Transcript of the Record, page 17). As a part of the contract of shipment the petitioner was required to sign, and did sign, a stipulation contained therein in the following terms (Transcript of the Record, page 7):

> "In consideration of his carriage without charge other than the sum stipulated herein for the carriage of the livestock mentioned herein, as a caretaker accompanying said livestock, the undersigned hereby agrees * * *
>
> "That the carrier shall not be liable for any accident or injury to him caused by negligence on either the going or return trip or while on or around the railroad tracks or premises, unless the undersigned, or his heirs or personal representatives shall, within thirty days after the accident or injury, give notice in writing of his claim therefor to the General Manager of the carrier on whose line it occurred, and unless such notice is given, no claim for personal injury * * * shall be valid or enforcible."

The train upon which Gooch was traveling contained several other shipments of livestock, and there were a number of caretakers traveling in the caboose. Early on the morning of November 24th, 1917, the train was lying on a siding of the respondent railroad company's line at Donovan, Wyoming.

The caretakers, including Gooch, were asleep in the caboose when the train crew uncoupled the engine from the front of the train and began switching operations which necessitated the coupling of the engine to the caboose. Without previous warning of any kind the engine ran into the caboose and literally reduced it to splinters, and John Gooch received the injuries for which he instituted his action to recover damages (Transcript of the Record, pages 13, 14, 15, 16 and 17).

Gooch was extricated from the wreckage by the members of the train crew and such caretakers as were slightly injured or not injured at all, and placed upon a blanket near the track where he remained for some two hours until the arrival of a train upon which he was carried to Kemmerer, Wyoming, where he was placed in the hospital of the respondent railroad company (Transcript of the Record, pages 13, 14, 15, 16, 17, 18 and 19). He remained in the hospital under the exclusive charge of the physicians and hospital attendants of the railroad company for four weeks and was then allowed a short trip home for Christmas, but he was not finally discharged from the hospital until January 15, 1918, about fifty-two days after he was injured (Transcript of the Record, pages 19 and 20). While in the hospital, and within a few days after his injury, and after he left the hospital, the question of a settlement with the railroad company was discussed by Gooch and L. Rasmussen, the claim agent of the respondent railroad company (Transcript of the Record, pages 25, 26, and 27), these negotiations beginning prior to the expiration of the thirty-day period from the date of his injury and continuing until some time after his discharge from the hospital.

Gooch did not file a written claim for damages with the respondent railroad company in accordance with the stipulation in the contract of carriage signed by him, and his failure so to do was held to be an absolute defense by the District Court and by the Circuit Court of Appeals.

SPECIFICATIONS OF ERRORS

The petitioner specifies and will urge as the only error committed, that the Circuit Court of Appeals was in error in holding the stipulation herein quoted to be a lawful stipulation, upon the ground that it is not permitted to common carriers of passengers to stipulate for any exemption from or limitation of liability on account of injuries received by passengers for hire caused by the negligence of the carrier or its servants. The argument of the petitioner is based exclusively upon the principles enunciated by this Court in the following cases:

N. Y. Cent. R. R. Co. vs. Lockwood, 17 Wall. 357;

Chicago, M. & St. P. R. R. Co. vs. Solan, 169 U. S. 133;

Norfolk, S. R. Co. vs. Chatman, 244 U. S. 276.

ARGUMENT

The extent to which carriers by contract may limit their liability for the negligence of themselves and their servants respecting both passengers for hire and goods has been clearly marked by this Court in comparatively recent decisions. (Reference is

made herein to the decisions affecting goods only because the District Court in Idaho and the Circuit Court of Appeals of the Ninth Circuit have erroneously, we believe, applied the principles of such cases to this case).

Under the Carmack Amendment a long line of decisions has been rendered, including St. Louis, I. M. & S. R. Co. vs. Starbird, 243 U. S. 592; Erie R. Co. vs. Stone, 244 U. S. 332; Southern P. Co. vs. Stewart, 248 U. S. 446; B. & O. R. Co. vs. Leach, 249 U. S. 217; and Erie R. R. Co. vs. Shuart, 250 U. S. 465, which sustained stipulations limiting the time within which the shipper was required to file his notice of claim for damages to shipments of goods. The first Cummings Act (Act of March 4, 1915, 38 Statutes at Large, 1196) made unlawful any limitations for the filing of notice of claim in less than ninety days. The foregoing decisions and acts, of course, apply to goods and not to passengers for hire.

As to passengers for hire, this Court early laid down the respective rights of the carriers and the passengers in the case of New York Central Railroad Company vs. Lockwood, 17 Wall. 357, wherein the conclusions of the Court were summed up as follows (17 Wall. 384):

> "The conclusions to which we have come are:
>
> "First: That a common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law.
>
> "Second: That it is not just and reasonable in the eye of the law for a common carrier to

stipulate for exemption from responsibility for the negligence of himself or his servants.

"Thirdly: That these rules apply both to carriers of goods and carriers of passengers for hire, and with a special force to the latter.

"Fourthly: That a drover traveling on a pass such as was given in this case for the purpose of taking care of his stock on the train is a passenger for hire."

We find a similar situation before this Court again in the case of Norfolk, Southern Railroad Company vs. Chatman, 244 U. S. 276, in the opinion in which case the following language occurs:

"It results that the settled rule of policy established by the Lockwood case, and the decisions following it, must be considered unmodified by the act to regulate commerce; that the plaintiff in charge of his stock, traveling upon a pass permitted to be issued by that act, was a passenger for hire, and the defendant's first claim must, therefore, be denied."

No case, however, has yet been before this Court where the limitation sought to be enforced by the carrier was one requiring notice of claim within a specified time.

The Circuit Court of Appeals of the Ninth Circuit in its opinion (Transcript of the Record, pages 47-49), while admitting the force of the Lockwood and Chatman decisions, was unable to distinguish the case at bar from the Starbird case in the 243rd United States, and Georgia, Fla. & Ala. Ry. Co. vs. Blish Milling Co., 241 U. S. 190, which involved shipments of goods, and which cases were decided under the act to regulate commerce. In addition to the in-

ability of the Court to sense the distinctions between shipments of goods, which are covered by the act to regulate commerce, and passengers for hire who are protected by the Lockwood decision, which this Court has stated is unaffected by the act to regulate commerce, it held, in effect, that the requirement of notice of claim was "a condition of recovery and not any exemption from or limitation of liability" (Transcript of the Record, top of page 48).

The suggestion of the Circuit Court of Appeals that a distinction exists in this regard between a condition of recovery and a limitation of liability lends sufficient dignity to the proposition to justify our temerity in seriously disputing it before this Court. The lawfulness or unlawfulness of the stipulation involved in this case must be tested by its effect in all cases, and not by its effect in this or any other particular case. If it is lawful in this case, then it is lawful in every case even though a compliance therewith is impossible by the injured passenger or by his personal representatives. If it is a condition of recovery in this case, then it is a condition of recovery in all cases even though it might operate as an absolute exemption from liability in certain cases. The stipulation requires that the injured passenger, or his heirs or personal representatives in case of his death, must file notice of claim within thirty days. If it is a lawful stipulation, then it is an absolute exemption of liability in every case in which a passenger dies thirty-one days, or more, after his injury. In the case of a passenger very slightly injured, however, so that he could be up and about the ordinary affairs of life within a few hours after the accident, it might be properly termed, as it has been termed by the Circuit Court of Appeals, a condition of recovery. The stipulation, therefore, if we seriously accept the dis-

tinction made by the Circuit Court of Appeals, is a condition of recovery in the cases where the injury is slight and the liability trifling, and merges into a limitation of liability as the seriousness of the injury increases, reaching the extreme of an absolute exemption of liability where the injury results in death thirty days—or more— after the accident.

Under the uniform holding of this Court since the decision in the Lockwood case in 1873, we submit that the stipulation embodied in the contract of carriage in this case is a limitation of liability and that the carriers of this country cannot so stipulate to limit the liability of themselves for injuries occasioned by their own or their servants' negligence.

The cause should be reversed and remanded and a new trial granted to your petitioner.

Respectfully submitted,

J. H. Peterson

T. C. Coffin

Counsel for Petitioner,
Residence, Pocatello, Idaho.

Service of the foregoing Brief, by receipt of three copies thereof, admitted this.....day of August, 1921.

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Residence, Salt Lake City, Utah,

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Residence, Pocatello, Idaho,
Counsel for Respondent.

IN THE

SUPREME COURT

OF THE UNITED STATES

October Term, 1920

Number 41[illegible]90

JOHN GOOCH, JR.
Petitioner.

vs.

OREGON SHORT LINE RAILROAD COMPANY, a Corporation,
Respondent.

Brief of Petitioner

On Petiton for Writ of Certiorari to the Circuit Court of Appeals of the United States for the Ninth Circuit.

J. H. PETERSON,
T. C. COFFIN,
Counsel for Petitioner.
Residence and Postoffice Address, Pocatello, Idaho.

IN THE

SUPREME COURT

OF THE UNITED STATES

October Term, 1920
Number 412

JOHN GOOCH, JR.
Petitioner.

vs.

OREGON SHORT LINE RAILROAD COMPANY, a Corporation,
Respondent.

Brief of Petitioner

On Petiton for Writ of Certiorari to the Circuit Court of Appeals of the United States for the Ninth Circuit.

J. H. PETERSON,
T. C. COFFIN,
Counsel for Petitioner.
Residence and Postoffice Address, Pocatello, Idaho.

The issue presented to this Court is simple. Your petitioner's action was instituted for the recovery of damages for injuries sustained by him while traveling on the Oregon Short Line Railroad as a caretaker passenger with a shipment of livestock from Bancroft, Idaho, to Omaha, Nebraska.

He signed the usual contract of carriage before starting with his shipment of livestock, and, as a part of the contract signed the following stipulation:

> "That the carrier shall not be liable for any accident or injury to him caused by negligence on either the going or return trip or while on or around the railroad tracks or premises, unless the undersigned or his heirs or personal representatives shall, within thirty days after the accident or injury, give notice in writing of his claim therefore to the General Manager of the carrier on whose line it occured, and unless such notice is given, no claim for personal injury shall be valid or enforcible."

At the trial of the cause in the District Court of the United States for the Eastern Division of the District of Idaho it developed in the plaintiff's case in chief that the plaintiff, your petitioner, had not complied with the provisions of the stipulation above quoted, requiring notice of the claim within thirty days of the time the injury was received. The trial court held that the plaintiff was bound by the terms of the foregoing stipulation and allowed the motion of the defendant for a non-suit (Transcript of the record page 59) upon this ground alone. (Transcript of the record pages 68 to 76.) Judgment of dismissal followed. (Transcript of the record, pages 20 to 21.)

Your petitioner thereupon filed his motion and notice of motion for a new trial (Transcript of the record, pages 21 and 22). Thereafter the District

Court entered its decision denying the motion (Transcript of the record, pages 23 to 26.) Your petitioner sued out a Writ of Error to the Circuit Court of Appeals for the Ninth Circuit. The Circuit Court of Appeals on April 5th, 1920, entered judgment affirming the judgment of the Trial Court, (Transcript of the record, pages 100-101) and on May 17th, 1920, denied your petitioner's application for a re-hearing and stayed the issuance of the mandate of the Court until June 21st, 1920, to permit of an application to this Court for a Writ of Certiorari. (Transcript of the record, pages 102-103.)

STATEMENT OF THE CASE

On the morning of November 23, 1917, John Gooch, Jr., made a shipment of livestock from Bancroft, Idaho, to Omaha, Nebraska, over the line of the respondent, the Oregon Short Line Railroad Company and its connecting carrier, the Union Pacific Railroad Company. Gooch personally accompanied the shipment as caretaker. (Transcript of the record, page 37.)

The train upon which your petitioner was traveling included several other shipments of livestock, and a number of other caretakers were on the train. About six o'clock on the morning of November 24th, 1917, while the caretakers were asleep in the caboose and while the train was lying on a siding at Donovan, Wyoming, the engine was uncoupled from the front of the train and was engaged in switching operations.

In the course of switching the engine ran into the caboose and literally reduced it to splinters, and John Gooch, Jr., your petitioner, received the injuries for which he instituted the action which is now before this court. (Transcript of the record, pages 27, 28, 31, 33, 35, 37.)

After Gooch was extricated from the wreckage the uninjured caretakers and members of the train crew placed him upon a blanket near the track where he remained for about two hours until the arrival of a train. He was then placed on a stretcher in the baggage car and carried to Kemmerer, Wyoming, where he was admitted to the hospital of the respondent Railroad Company. (Transcript of the record, pages 29, 30, 31, 32, 33, 34, 36, 39, 40.) He remained in the hospital under the exclusive care of the physicians and hospital attendants of the Railroad Company for four weeks and was then allowed a short trip home for Christmas, (Transcript of the record, pages 40, 42.) after which he returned to the hospital and was finally discharged therefrom on January 15th, 1918, (Transcript of the record, page 42,) about fifty-two days after he received his injuries. During the time that Gooch was lying in the hospital recovering from his injuries consisting of broken bones, body bruises and a serious heart lesion, he was visited on at least two occasions by L. Rasmussen, the Claim Agent of the respondent Railroad Company, who endeavored to discuss with him a settlement and made him offers. Gooch declined to consider the offers at the time or to discuss the matter until he had an opportunity to consult his

own physician, for the reason, as stated by him, that he was not in a condition mentally or physically to discuss the matter and that he did not know the extent of his injuries. (Transcript of the record, pages 44, 53-56.)

After Gooch's final discharge from the hospital the Claim Department of the respondent Railroad Company continued negotiations with him for a settlement, and upon the failure of the negotiations Gooch instituted this action. (Transcript of the records, pages 67-68.)

The respondent Railroad Company, as a defense to the action, set up the failure of Gooch to give written notice of claim to the General Manager of the Oregon Short Line Railraod Company for damages for the injury sustained by him within thirty days of the time he received the injury. (Transcript of the record, pages 17-18.) This defense, the trial court held, was well taken, and its decision in this respect has been sustained by the Circuit Court of Appeals of the United States for the Ninth Circuit. The ground upon which your petitioner seeks to have a Writ of Certiorari issue, is that common carriers of passengers cannot lawfully stipulate for such limitation of or exemption from liability as is contained in the contract of carriage here involved.

BRIEF OF THE ARGUMENT

It is not permitted to common carriers of passengers to stipulate for any exemption from or limi-

tation of liability on account of injury received by passengers for hire caused by the negligence of the carrier or its servants, and the contract of carriage upon which your petitioner was traveling at the time he received his injuries is such a contract as has been held unlawful by this Court in the following cases:

New York Central R. R. Co. vs. Lockwood, 17 Wall. 357;

Chicago M. and St. P. R. R. Co. vs. Solan, 169 U. S. 133, and

Norfolk Southern R. R. Co. vs. Chatman, 224 U. S. 276.

ARGUMENT

We believe that this court has, in two distinct and well established lines of decision, blazed the way for the proper determination of all questions affecting the rights of common carriers to stipulate for exemption from liability, as respects both goods and passengers.

As respects the rights of common carrier to stipulate for an exemption from liability for damage to goods and with particular reference to stipulations requiring notice of claim for damages within a specified time, reference need be made only to the case of St. Louis I. M. & S. Railroad Company vs. Starbird, 243 U. S. 592. That cause arose while the Carmack Amendment was still in force and in the

decision of this court reference was made to the fact that the First Cummins Act might change the rule. We believe it is a fair assumption to make that the decisions of this court promulgated after the enactment of the Carmack Amendment to the Interstate Commerce Act had the effect of directing the attention of Congress to the situation, and were responsible for the enactment by Congress of the so called First Cummins Act. It is worthy of attention that the First Cummins Act dealt specifically with the right of an interstate common carrier to stipulate for the filing of notice of claim within a specified period as a condition precedent to the institution of an action. That act made any stipulation requiring notice in less than ninety days unlawful.

At the time of the occurence of the accident upon which the present cause of action is founded, the First Cummins Act was in effect, and, had the stipulation in question been one in regard to goods instead of passengers it would have been unlawful under that act.

The other line of decisions of this Court, viz., affecting passengers for hire, is the line beginning with the case of the New York Central Railroad Company vs. Lockwood *Supra*, and ending with the case of Norfolk Southern Railroad Company vs. Chatman *Supra* These cases have to do with injuries to caretaker passengers received while traveling upon contracts of carriage exempting common carriers from liability. In none of these cases has the exemption sought to be

established by the carriers taken the form of a requirement of notice of claim within a specified period, and consequently we believe this is a case of first impression insofar as this Court is concerned.

When analyzed in the light of the decisions of this court just mentioned we believe the issue naturally narrows itself to the limits of the decision of the Circuit Court of Appeals, viz:—that the stipulation in question is a "*condition of recovery*" or an "*exemption from or limitation of liability*". In thus presenting this issue to the Court however, we do not wish to be understood as taking the view that such a distinction can be made in any case. We believe that if the stipulation here involved is to be held lawful, it is only by such a distinction as was made by the Circuit Court of Appeals, and it is to the purpose of showing the unsoundness of that distinction that we will address ourselves in this argument.

The stipulation which the respondent Railroad Company has included as a part of its livestock contract of carriage, and which it has filed as a part of its tariffs with the Interstate Commerce Commission, must be tested, not by its effect upon a passenger in any particular case, but by its effect upon passengers in all cases. It matters not that in one case the stipulation might justly be called a simple condition of recovery if in another, it would be a complete exemption of liability. It either is or is not a lawful stipulation and must be tested in the light of the decisions of this court in the Lockwood, Solan and